common (Sec. 26.2). But this again refers to the trial court and at any event, it would seem clear this Court would not interfere with the Illinois Supreme Court's exercise of discretion in these circumstances (*City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219).

From the foregoing it appears there are three adequate State grounds to support the Illinois Supreme Court's denial of the petition: (a) intervention is permitted in the trial court only; (b) the petition was not timely, being filed after the final decision of the Supreme Court; and (c) intervention could be denied in the Court's discretion.

2. Petitioner Has An Available Remedy in His Case Now Pending in an Illinois Trial Court.

Petitioner can attack the Illinois Supreme Court's opinion in the circuit court of Kane County; and then, on appeal, properly present his case to the Supreme Court itself, and to this Court if warranted.

The circuit court may dispose of petitioner's case apart from any federal question; it could conceivably rule favorably on his present constitutional contention.

He has not exhausted his State remedies and hence cannot seek certiorari here. *Woods* v. *Nertheimer*, 348 U. S. 211.

As a practical reason for denying certiorari here, it is pointed out that if all litigants in trial courts who are affected by the language of an opinion in a state reviewing court could, without litigating their cases in the trial courts, obtain certiorari in this Court, the volume of cases heard by this Court would be considerably augmented.

3. There Is Nothing Unconstitutional in the Opinion of the Court in Thomas Molitor, by Peter Molitor, His Father and Next Friend v. Kaneland Community Unit District.

There is no doubt the opinion of the Illinois Supreme Court could constitutionally have been made wholly prospective, and denied relief to plaintiff-appellant Thomas Molitor. *Great Northern Railway Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358.

The Court elected to apply its new rule to Thomas Molitor to avoid the objections of *dictum*, lack of incentive for challenging precedent, and hardship to Kaneland which had relied on its precedents; and to apply it prospectively otherwise.

Petitioner asserts this deprives him of due process of law and of equal protection of the law because it does not apply to him.

He asserts the Court discriminated between plaintiff-appellant Thomas Molitor and all others injured in the same bus accident, including petitioner.

Certainly the Court discriminated between Thomas Molitor and all others in the school bus by applying its new rule only to the one who challenged on appeal the old rule. It also discriminated between Thomas Molitor and all other persons injured by the negligence of agents of Illinois governmental agencies from the admission of the State until December 16, 1959, when its modified opinion was filed.

It is also true that the decision discriminated against Kaneland by subjecting it to unlimited liability in the Thomas Molitor case while recognizing its justifiable reliance on precedent. Kaneland's justifiable reliance was the basis of the Court's applying its new rule only to the plaintiff-appellant before it, thus preserving that school district

from unanticipated liability in an enormous amount without any forewarning thereof.

Other Illinois governmental units have now been forewarned.

Overruling decisions are by nature discriminatory because they always affect existing claims and defenses.

But it is equally true that such discrimination does not deprive of due process or equal protection either persons aggrieved by a decision later overruled, or persons aggrieved prior to the effective date of a prospectively operating reversal.

By applying its decision only to Thomas Molitor, the plaintiff-appellant before it, and to all future occurrences, the Court achieved the results of changing what it considered an outmoded rule of law, providing all litigants an incentive to challenge other outmoded precedents, and preserving Kaneland from the hardship which otherwise would have been visited upon it because of its justifiable reliance on all of the Court's holdings.

This discrimination, so based, deprived no one of due process of law or of equal protection of the law.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MATTHEWS, JORDAN, DEAN & SUHLER,
33 So. Island Avenue,
Aurora, Illinois,
Attorneys for Respondent.

DAVID JACKER,
JOHN T. MATTHEWS,
THOMAS F. SCULLY,
Of Counsel.